
CONSTRUCTION & PROFESSIONAL SERVICES MANUAL – 2004

CHAPTER 3: GENERAL TERMS & CONDITIONS FOR PROFESSIONAL SERVICES

SECTION 301.0 GENERAL POLICIES ON ARCHITECTURAL AND ENGINEERING SERVICES

301.1 License/Registration: Entities (e.g. individual, partnership, or corporation) offering to provide architectural and/or engineering services shall be properly registered and licensed in Virginia as required by the Department of Professional and Occupational Regulation (DPOR), Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects (APELSCIDLA) Board, and, if incorporated, the State Corporation Commission. Professional Corporations must obtain a Certificate of Authority as required by §13.1-549. Other business entities must register with DPOR as required by §54.1-411., Code of Virginia, as amended.

The Architect or Engineer (i.e. the person) "in responsible charge" for each discipline shall be currently licensed in the Commonwealth of Virginia and shall affix his or her seal to those documents for which he or she is responsible.

301.2 Prime Design Professional: Owners normally contract with a single entity as "Prime Design Professional" to provide the project architectural and/or engineering services. Such Prime Design Professional may have all necessary disciplines in-house or it may subcontract with consultants to provide services in some disciplines. The Prime Design Professional may be an Architect, an Engineer, or an A/E entity. The Owner shall determine which entity best satisfies the Owner's requirements for providing the services, meeting the time schedule and budget limitations, and managing the services to be provided on the particular project.

301.3 Associations : Contracting with an association of firms, such as joint ventures or associated A/E's, involves additional business and legal considerations. Factors to be considered include whether the Association is a registered or licensed entity authorized to offer the services in Virginia, the nature of each party's responsibilities to the other and to the Owner, the professional liability insurance coverage of the Association, its organization and management structure, each firm's financial condition and/or stability with respect to fulfilling its obligations under the Contract, and whether the parties to the Association are jointly and severally liable for the Work. Prior to selecting an Association for fee negotiation for a possible contract award, the Owner shall request a review of the Association's legal documents, preferably by the Office of the Attorney General but by the Owner's staff legal counsel as a minimum. Associations not legally constituted and authorized to offer the requested services in Virginia at the time of the closing date of the RFP will be deemed 'not responsive'.

301.4 Disadvantaged Businesses: It is the policy of the Commonwealth of Virginia to contribute to the establishment, preservation, and strengthening of small businesses and businesses owned by women and minorities and to encourage their participation in State procurement activities. The Commonwealth encourages contractors to provide for the participation of small businesses and businesses owned by women and minorities through partnerships, joint ventures, subcontracts, or other contractual opportunities. All procurements by competitive negotiation for professional or non-professional services that are expected to exceed \$100,000 in value shall include consideration of the proposer's past and proposed use of small businesses and businesses owned by women and minorities in the evaluation of proposals.

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SECTION 302.0 PROFESSIONAL SERVICES

The architectural, civil, structural, mechanical and electrical portions of the project shall be planned and designed by or under the immediate supervision of a licensed Architect or Engineer who has expertise in the particular discipline involved. Where such licensed expertise is not available within the A/E of record or where the A/E chooses to subcontract a part of the Work, the A/E shall employ an associate or consulting Architectural or Engineering firm with the requisite expertise to provide the required services. The consultants, associates, or subcontractors proposed by the A/E during the selection process to be part of the A/E project team shall perform the Work as proposed. If circumstances require a change, the A/E shall advise the Owner of the proposed change, the reasons therefore, and the name and qualifications of the proposed replacements. The replacements must be acceptable to the Owner.

Associates, consultants or subcontractors proposed to be part of the A/E's project team shall be contracted by the A/E at the beginning of the Work and shall be active participants in all phases of the Work related to their discipline from beginning to end. The A/E shall be responsible to the Owner for the Work of all associates, consultants and subcontractors, whether employees of the A/E or not, performed under the Contract.

SECTION 303.0 TAXPAYER IDENTIFICATION NUMBER

The A/E shall furnish to the Owner at the time of contract award its Federal Employer Identification Number (FEIN) if a corporation or a partnership or its Social Security Number (SSN) if a sole proprietor.

SECTION 304.0 RELATIONSHIP OF ARCHITECT/ENGINEER TO OWNER

Once the Contract for A/E services has been fully executed, the A/E shall be the professional advisor and consultant to the Owner for technical matters related to the project and shall be responsible directly to and only to the Owner. The Owner shall communicate all approvals, rejections, change requirements and other similar information to the A/E. The A/E shall advise the Owner of changes necessary to keep the project within the prescribed area and cost limits. The A/E's status, relationship and authority during the construction phase of the project are further defined in Section 15, paragraphs (a) thru (h) of the General Conditions of the Construction Contract, and are included herein by reference.

Generally, the Owner will observe the procedure of issuing orders to the Contractor through the A/E or, if the A/E's construction period duties have been so modified, through the Owner's designated project representative. If the Owner issues orders directly to the Contractor, the A/E shall be copied on such orders.

SECTION 305.0 ARCHITECT/ENGINEER'S MANUAL

The Construction & Professional Services Manual – 2004 (called the Manual), Chapters 1 thru 10 including Appendices A thru Z, and all revisions thereto, shall be called the “A/E Manual” for

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identification and the “**A/E Manual**” shall be incorporated into the Contract in its entirety except as amended or superseded in the Contract or an addendum thereto.

For the sake of simplicity, the provisions of the **A/E Manual** dealing with Architects and Engineers are written as though they apply to the design of buildings and to construction administration only. They also shall apply, however, to all architectural and engineering services of every kind including, but not limited to, project studies, development of master site plans, other studies, and related professional services.

Many of the changes, additions, or deletions made in revisions to the **A/E Manual** are necessary to keep abreast with codes, statutes, or regulations related to the project. They require immediate compliance. If the A/E determines that including the requirements of the 2004 Edition of the Manual or any **A/E Manual** revision issued subsequent to the revision shown on the Contract Between Owner and Architect/Engineer (CO-3), will require additional work on its part, the A/E shall notify the Owner of same within 60 days of the date of distribution of the revision, and shall provide an itemized list of the additional work required by the revision. The Owner shall, after consultation with the Division of Engineering and Buildings, provide direction to the A/E regarding incorporating the requirements of the revision and, if appropriate, issue a change order to the A/E for the **extra** work as described in Chapter 6 of the **A/E Manual**. Generally, revisions issued prior to the date of approval of the preliminary submittal can be incorporated with minimal, if any, additional work on the part of the A/E.

If the A/E fails to notify the Owner within 60 days after the date of distribution of the revision that the revision will require additional work on the A/E's part, the A/E waives the right to make claims for additional services based on the contents of the revision.

SECTION 306.0 "DESIGN-NOT-TO-EXCEED" COST AS RELATED TO A/E CONTRACT

The Owner shall provide the A/E with a description of the project including information on functions, space requirements, special features and requirements, aesthetic requirements, authorized square footage and "Design-not-to-exceed" construction budget. The A/E's Contract requires that if the low bid exceeds the "Design-not-to-exceed" cost identified in the A/E Contract by more than 10%, any A/E revisions to the plans and specifications required to bring the cost of the project within the "Design-not-to-exceed" cost may be executed by the A/E at no additional cost to the Commonwealth.

The A/E's cost estimate shall be in the systems format described in Chapter 8 and Appendix E and shall be to a level of detail commensurate with the current level of design. The A/E shall submit a cost estimate with each phase submittal. If the cost estimate indicates a potential problem in securing a bid within the "Design-not-to-exceed" cost, the A/E shall notify the Owner and shall work with the Owner to redefine the design concepts of space utilization, building efficiencies, materials of construction, etc., so that the estimated cost of construction does not exceed the "Design-not-to-exceed" cost. Substantial changes in the project scope, such as those which affect the area or function of the proposed facility, must be justified by the A/E and may require the approval of the Governor or his designee.

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SECTION 307.0 CODE AND REGULATORY COMPLIANCE

The A/E is responsible for designing the project and administering the construction phase of the project in accordance with the Virginia Uniform Statewide Building Code (Code), the **A/E Manual** and other regulatory requirements applicable to the project. Nothing contained herein shall be construed as relieving any A/E, professional design consultant, contractor, supplier or any other participant from any professional or legal responsibility for performance. Reviews, comments and approvals by the Department of General Services and its Divisions, or the staff of any State Owner, in no way absolve any other person, firm or corporation involved in a project from their full responsibilities under law, codes and professional practice as required in projects for the Commonwealth of Virginia. Lack of comment by a State reviewer does not relieve the A/E from designing to meet the Code or **A/E Manual** requirements or applicable state regulations or local regulations related to water, sewer, fire department service, and other utilities.

If the correction of a Code, **A/E Manual** or regulatory violation results in a Change Order during construction, any additional costs incurred shall be borne by the party responsible for the violation. The Owner will bear only the costs attributable to the actual Code or regulation-required enhancement of the project.

If the A/E believes that a Code, an **A/E Manual** requirement, or a regulation is unclear as to meaning, he shall request a written opinion as to the applicable interpretation from the Division of Engineering and Buildings or from the applicable regulatory agency, as appropriate, and the A/E shall be entitled to rely on the written opinion, if any, which he receives.

SECTION 308.0 A/E LIABILITY INSURANCE, DESIGN ERRORS AND/OR OMISSIONS and RECORDS RETENTION

308.1 A/E LIABILITY INSURANCE: The A/E shall carry professional liability insurance covering negligent acts, errors, and omissions. The minimum amount of professional liability insurance required to be carried by the A/E shall be calculated as not less than an amount equal to 5% of the estimated cost of construction of all State-owned projects designed by the A/E which are currently under construction, but in no event shall the amount of professional liability insurance be less than \$100,000 per claim. As an alternative to the calculated amount indicated above the A/E may work with the Owner/Agency to procure a 'Project Insurance' package for that project which is satisfactory to the Owner / Agency or the A/E may provide a Certificate of insurance indication coverage in the amount of \$2,000,000 per claim and \$6,000,000 in the aggregate.

The A/E shall maintain this insurance coverage in force after completion of the services under the contract for a period of five years after final completion of construction or the A/E may purchase a 'completed operations' coverage for the project or projects.

Neither DEB's nor the Owner's review, approval, or acceptance of, nor payment for any of the services required shall be construed to operate as a waiver by the Owner of any rights or any cause of action arising out of the Contract. The A/E shall be and remain liable to the Commonwealth for all

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costs of any kind which are incurred by the Commonwealth as a result of negligent acts, errors, or omissions on the part of the A/E including its subcontractors and consultants, in the performance of any of the services furnished.

308.2 DESIGN ERRORS AND/OR OMISSIONS: The A/E shall be responsible for all costs resulting from its errors, omissions, and other breaches of the applicable standards of care established by the **A/E Manual** and/or under Virginia law including, but not limited to, its own costs for labor and other in-house costs, any resulting Contractor Change Order costs including the costs for demolition, cutting, patching, repairs, removal, or modification of Work that is already in place, any Contractor or Owner delay damages, and any judgments, fines or penalties against the Owner resulting from A/E errors, omissions, and other breaches of the applicable standards of care. However, the A/E shall not be responsible for the cost of the correct equipment or system which should have been originally specified, except the A/E shall be responsible for any increased costs, whether the result of inflation, reordering, restocking or otherwise, of incorporating the corrected Work into the Contractor's Contract Change Order. For the purposes of determining the A/E's share of such costs for Work which has not yet been performed, the cost of Work performed by Contractor's Change Order shall generally be presumed to be 15% greater than if the Work had been included in the Contractor's Contract. The A/E shall have the burden of disproving this presumption. When determining the A/E's contribution for Change Orders attributed to errors and omissions (where the work has not yet been done by the Contractor), the Owner / Agency should also take into account the actions and efforts of the A/E during the construction phase that were above and beyond the scope of its contract to assist the Owner in obtaining a timely, quality product.

The Commonwealth shall actively pursue reimbursement of costs resulting from the A/E's errors, omissions, or breaches of the applicable standard of care. Upon determination that there may be A/E financial responsibility involved, the A/E shall be contacted by the Owner. The A/E shall be advised of the design deficiency, informed that it is the Agency's opinion that the A/E may be financially responsible, and requested to provide a technical solution to the problem, including cost estimate. Upon notification of potential liability, the A/E should coordinate with the Owner to determine required technical support and timing to minimize delay costs. Pending final decision by the Owner, the A/E will be invited to attend all price negotiations with the Contractor for the corrective work. The A/E shall participate as a non-voting technical advisor to the Owner's negotiator. If the A/E refuses to cooperate in the negotiations or disputes its responsibility, the Owner shall have the right to proceed with the remedial construction and/or change order negotiations without the A/E.

All changes to the Contract Document, whether to correct errors or omissions, to accommodate unforeseen or differing site conditions, or Owner requested changes, must be made / documented by Change Order, using Form CO-11.

308.3 RECORDS RETENTION: The A/E shall retain record copies of its design calculations, drawings, bid /contract documents, addenda, field orders, clarifications and responses to Requests For Information, approved shop drawings and submittals, inspection / observation reports, fiscal records, and other documents relative to the contract for five (5) years after completion of the services under the contract or five years after completion of construction, whichever occurs earlier. Should the A/E

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cease its business prior to that time, the A/E will provide those project related documents to the Owner for safe keeping.

SECTION 309.0 OTHER INSURANCE REQUIRED OF THE A/E

Prior to the start of any work under the contract, the A/E shall provide to the Owner Certificates of Insurance forms approved by the Commonwealth of Virginia and shall maintain such insurance until the completion of all Work under the contract. The minimum limits of liability shall be as follows:

Worker's Compensation -- Standard Virginia Workers Compensation Policy with statutory requirements and benefits;

Employers Liability -- \$100,000;

Broad Form Comprehensive General Liability -- \$1,000,000 Combined Single Limit coverage. The Commonwealth of Virginia shall be named as an additional insured with respect to the services being provided. The coverage shall include: Premises / Operations Liability; Products and Completed Operations Coverage; Independent Contractors Liability; Owners and Contractor's Protective Liability; and Personal Injury Liability (Libel, Slander, Defamation of Character, etc.);

Automobile Liability -- \$500,000 Combined Limit for bodily injury and property damage per occurrence.

SECTION 310.0 OWNERSHIP OF DOCUMENTS AND MATERIALS

Ownership of all materials and documentation including the original drawings and the Plans and Specifications and copies of any calculations and analyses prepared pursuant to the Contract between the Owner and the A/E, shall belong exclusively to the Owner. These materials and documentation, whether completed or not, shall be the property of the Commonwealth of Virginia whether the work for which they are made is executed or not. The A/E shall not use these materials on any other work or release any information about these materials without the express written consent of the Owner.

Such material may be subject to public inspection in accordance with the Virginia Freedom of Information Act. Security-related documents and information are excluded from the Act unless a specific need to know can be shown. Trade secrets or proprietary information submitted by a bidder, offeror, or contractor in connection with a procurement transaction shall not be subject to disclosure under the Virginia Freedom of Information Act, provided the bidder, offeror, or contractor invokes the protections of §2.2-4342.F., *Code of Virginia*, prior to or upon submission of the data or other materials, identifies the data or materials to be protected and states the reason why the protection is necessary.

The A/E shall provide the following documents to the Owner at the completion of the A/E's work:

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- original sealed and signed drawings
- original copy of the specifications
- copy of analyses made for the project
- indexed copy of the calculations made by each discipline for the project
- the Owner copy of all shop drawings, submittals, cut sheets, operation and maintenance instructions, parts lists, and other material related to the project.

The Commonwealth of Virginia, as owner of the documents prepared for its projects, has the right to use the project documents as a prototype to demonstrate scope, size, functional relationships, etc., to an A/E designing a similar project. The A/E for the original project design shall not be responsible or liable to the Owner for any such use of the documents.

The A/E for the similar project shall be responsible for providing a complete set of project and location-specific "Final Documents" with its seals and signatures which meet all applicable codes and standards in effect at the time those "Final Documents" are submitted.

SECTION 311.0 STANDARD PLANS

Where the Owner has engaged the A/E to prepare "Standard Designs", "Standard Plans" and/or "Prototype Plans" for structures such as picnic shelters, sheds, bath houses, single family residences, cabins and utility buildings for the Owner to site adapt for use at various locations, the drawings for the Standard or Prototype Plans shall show

- the name of the Owner,
- the Title of the Standard or Prototype Structure for which the design was developed,
- the name of the A/E, and
- the seal and signature of the responsible licensed professional.

The Standard Plans shall also show the applicable codes, standards, loadings and design parameters used to develop the design.

Where the A/E has not been engaged to review the site adaptation of the Standard Plans nor review the submittals or construction, the Owner, and not the A/E, shall be responsible for the proper site adaptation and use of the Standard Plans. The A/E shall, however, be responsible for negligent acts, errors or omissions in the Standard Plans.

When the Work involves the site adaptation of Standard Plans, the cover sheet for the project plans shall list the drawings included in the set of plans and shall differentiate between the Standard Plans and the "site-specific" site development, utility, and foundation drawings prepared by the A/E for that site. These site-specific drawings shall be sealed and signed by the responsible licensed A/E.

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SECTION 312.0 REQUIREMENTS FOR A/E SEALS AND SIGNATURES

General: The Seal and Signature of the licensed Professional Engineer, Architect or Certified Landscape Architect on the drawings provides notice to the public the drawings are complete and that the professional has exercised complete direction and control over the work to which the seal or signature is affixed. All plans and specifications for building projects designed for the Commonwealth of Virginia and its Agencies must bear the seal and signature of the responsible licensed professional.

Each drawing to be reproduced shall show

- the name of the A/E,
- the Project Title,
- the Project location,
- the 8 digit state Project Code,
- the Drawing / Sheet Title,
- the Drawing / Sheet number,
- the seal and signature of the responsible licensed professional,
- and the uniform date of the completed documents

The Title sheet drawing(s) shall also have

- the Index of Drawings,
- the Project VUSBC data,
- the Seal and Signature of the A/E Principal-In-Charge of the project,
- and the uniform date of the completed documents.
- (A/E may also require the seal and signature of a principal of its consultants.)

The Specifications Table of Contents shall have

- the Seal and Signature of the A/E Principal-In-Charge of the project,
- the uniform date of the completed documents, and
- the listing of specification sections included for the project.
- (A/E may also require the seal and signature of a principal of its consultants.)

“Working Drawing Sets” submitted to BCOM for review are expected to be complete documents ready for bidding. All drawings except the cover sheet shall bear the seal of the responsible licensed professional. The Cover Sheet shall show a complete list of the drawings in the set, but a seal and signature are not required at this submission.

"Final Documents" or **“Construction Documents”** are completed documents ready for bidding and include all corrections required by the BCOM review. Each sheet of the drawings reproduced in the bid documents, including the cover sheet, shall bear the seal and signature of the responsible licensed professional and a uniform document date. The original cover sheet without seal and signature shall be reproduced and attached to copies of the other drawings in the set. Each cover sheet print shall

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then be sealed, signed and dated with original seals and signatures. These official "Final Documents" shall be distributed to the following:

- 1 set Building Official (at BCOM)
- 1 set Regional Fire Marshal's Office
- 3 sets Owner
- (1 set Reviewer who reviewed the documents, if other than BCOM)

"Addendum" to the Final Documents: The first sheet of each and every addendum issued to bidders shall show the number of pages in the addendum and shall list any attached sketches, drawings or other material included in the addendum. In addition, the first sheet of each and every Addendum shall bear the name of the project, the 8 digit State Project Code number, the date and the seal and signature of the responsible licensed professional. Copies of each addendum with seal and signature shall be distributed to the above recipients in the same fashion as the official "Final Documents".

Each addendum shall show

- the name of the A/E,
- the Project Title,
- the Addendum Number,
- the 8 digit state Project Code,
- the seal and signature of the responsible licensed professional,
- the date of the Addendum
- the page number and total number of pages,
- and a list of any attachments to and part of the Addendum

SECTION 313.0 SUBCONTRACTS

No portion of the A/E professional services shall be subcontracted without prior written consent of the Owner. Consultants proposed by the A/E during the selection and fee negotiation phases are assumed to be acceptable to the Owner unless the Owner notes otherwise during those phases. In the event that the A/E desires to subcontract some part of the Work required by the Contract to a consultant or subcontractor not previously approved, the A/E shall furnish the Owner names, qualifications and experience of the proposed consultants. The A/E shall, however, remain fully liable and responsible for all Work performed by his consultants and subcontractors and shall assure that their Work complies with all requirements of the A/E's Contract.

SECTION 314.0 MODIFICATION OF THE A/E CONTRACT (A/E CHANGE ORDERS)

The Owner may, upon mutual agreement with the A/E, issue written modifications to the scope of services of the Contract using G.S. Form E&B CO-11a/e. Any single change order, or accumulation of change orders, which increases the A/E Contract Amount by 25% of the original contract amount or \$50,000, whichever is greater, must have the prior approval of the Governor or his designee. (§2.2-4309, Code of Virginia as revised)

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The first Change Order which causes the cumulative total of Change Orders to exceed \$50,000 or 25 percent of the original Contract Price, whichever is greater, and all subsequent A/E Change Orders which increase the Contract Amount must have the prior approval of the Governor or his designee. (§2.2-4309, Code of Virginia as revised) Once the cumulative total of modifications exceeds **25%** of the original contract amount, or \$50,000, whichever is greater, all succeeding Change Orders which **increase** the Contract Amount must receive said prior approval.

In making any modification, the resulting increase or decrease in cost shall be determined by one of the methods selected by the Owner in accordance with requirements of the Public Procurement Act and Chapter 6 of the **A/E Manual**.

SECTION 315.0 PAYMENTS TO THE ARCHITECT/ENGINEER

The following procedures are established in conformance with the Virginia Public Procurement Act (VPPA), §2.2-4300 thru 2.2-4377, *Code of Virginia* as amended, and, in particular, §2.2-4347 et seq., which is referred to as the Prompt Payment Act.

- (1) The A/E shall submit its invoice to the Owner in the format shown in Appendix C and with the documentation required by the Owner. The invoice shall generally itemize or show a breakdown of the various phases or parts of the Total Contract Amount, the value of the various phases or parts, the previously invoiced and approved amounts for payment, and the amount of the current invoice. The invoice shall also include a certification statement signed by the A/E stating that the A/E has paid its consultants, subcontractors and suppliers their individual proportional share of all previous payments, including interest, received from the Owner. Invoices for reimbursables shall include documentation of costs for which reimbursement is sought. Invoices for Work being performed on an hourly rate basis shall show the technical classifications, names of the persons performing the work, manhours expended, marked up hourly rates for the classification, and the extended cost amount.
- (2) Unless there is a dispute about the compensation due the A/E including, but not limited to, claims by the Owner against the A/E, then within thirty (30) days after receipt by the Owner of the A/E's invoice, which shall be considered the invoice receipt date, the Owner shall pay to the A/E the amount approved less any retainage and less any prior payments or advances made to A/E. The date on which payment is due shall be referred to as the Payment Date.
- (3) The Owner may agree to make progress or partial payments to the A/E during any phase of the Work based on the estimated value of the Work completed by the A/E on that phase. Any such progress payment shall be based on the Owner's opinion of the value of the Work completed as of the date of the invoice. The A/E may invoice the Owner and, if the Owner agrees that the submittal for the particular design phase is complete, the Owner may approve payment of a cumulative amount of not more than 95% of the value of that phase at the time the phase submittal is made to the Owner. The A/E may invoice the Owner for the remaining 5% (balance of the value of that phase) when the submittal has been reviewed and approved.

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- (4) Disputes about the compensation due the A/E may include, but are not limited to, the amount due, the value or percentage of the Work completed, defects or deficiencies in the Work, quality of the Work, compliance with the Contract Documents, completion itself, or negligent acts, errors, or omissions on the part of the A/E. In the event of disputes, payment shall be mailed on or before the Payment Date for amounts and Work not in dispute, subject to any setoffs claimed by the Owner.
- (5) All prior payments, whether based on estimates or otherwise, may be corrected and adjusted in any payment and shall be corrected and adjusted in the final payment. In the event that any invoice by the A/E contains a defect or impropriety which would prevent payment by the Payment Date, the Owner shall notify the A/E in writing of such defect or impropriety within ten (10) days after the invoice receipt date. Any disputed amounts determined by the Owner to be payable to the A/E shall be due thirty (30) days from the date the dispute is resolved.
- (6) Interest shall accrue on all amounts owed by the Owner to the A/E which remain unpaid seven (7) days following the Payment Date. Said interest shall accrue at the discounted ninety day U.S. Treasury bill rate as established by the Weekly Auction and as reported in the publication entitled The Wall Street Journal on the weekday following each such Weekly Auction.

During the period of time when the amounts due to the A/E remain unpaid following the fifteenth day after the Payment Date, the interest accruing shall fluctuate on a weekly basis and shall be that established by the immediately prior Weekly Auction. It shall be the responsibility of the A/E to gather and substantiate the applicable weekly interest rates to the satisfaction of the Owner and to calculate to the satisfaction of the Owner the interest due. In no event shall the rate of interest charge exceed the rate of interest established pursuant to §58.1-1812, *Code of Virginia*.

No interest shall accrue when payment is delayed because of a dispute between the Owner and the A/E as described in subparagraph (4) above, or a dispute as to the accuracy of any Request for Payment received. This exception to the accrual of interest shall apply only to that portion of a delayed payment which is actually the subject of the dispute and shall apply only for the duration of such disagreement. Nor shall interest accrue on retainage, which is withheld to assure faithful performance of the Contract.

No interest penalty shall be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Setoff Program commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of setoff no debt was owed to the Commonwealth, interest shall accrue at the rate determined above on amounts withheld which remain unpaid after seven days following the payment date.

In those cases where payment is made by mailing, the date of mailing of any payment by the U.S. Postal Service is deemed to be the date of payment to the addressee. Where payment is

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made by electronic transfer of funds, the date of the transfer of funds is deemed to be the date of payment.

The Owner is entitled to interest on all amounts from the A/E that remain unpaid thirty (30) days after the amount is deemed due, whether as a result of a resolution of a dispute or otherwise. Any such interest shall be calculated by the same method as set forth in this subsection.

SECTION 316.0 PAYMENTS BY ARCHITECT/ENGINEER

The following procedures are established in conformance to the Virginia Public Procurement Act (VPPA), §2.2-4300 thru 2.2-4377, *Code of Virginia* as amended, and, in particular, §2.2-4347 et seq. (Prompt Payment Act).

The A/E shall at the time of contract award by the A/E require every consultant, subcontractor and supplier to provide its Social Security Number (SSN), if a sole proprietor, or its Federal Employer Identification Number (FEIN), if a corporation or partnership.

Except in cases of bona fide disputes, or where the A/E has some other justifiable reason for delaying payment, the A/E shall pay:

- (1) To each of its Consultants, Subcontractors and Suppliers, not later than seven (7) calendar days after receipt of amounts paid to the A/E by the Owner, the proportionate share of the total payment, including any interest, received from the Owner attributable to the Work performed by Consultants and Subcontractors and materials furnished by Suppliers less a retainage of not more than five percent (5%), said retainage being the same money, not additional money, retained by the Owner from the payment to the A/E.
- (2) In the case of bona fide disputes or where the A/E has some other justifiable reason to delay payment, not later than seven (7) calendar days after receipt of amounts paid to the A/E by the Owner, the A/E shall notify the Owner and the Consultant, Subcontractor or Supplier, in writing, of his intention to withhold all or a part of the Consultant, Subcontractor or Supplier's payment with the reason for nonpayment. The A/E shall make timely payments of those portions of the payment not in dispute.
- (3) The A/E shall pay interest to the Consultants, Subcontractors or Suppliers on all amounts owed by the A/E that remain unpaid after seven (7) days following receipt by the A/E of payment from the Owner for work performed by the Consultants, Subcontractors or materials furnished by Suppliers under the contract, except for amounts withheld as allowed in subsection (2) of this Section. Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month.
- (4) The A/E's obligation to pay interest to its Consultants, Subcontractors or Suppliers pursuant to subsection (3) of this Section shall not be construed to be an obligation of the Owner.

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- (5) A contract modification shall not be made for the purpose of providing reimbursement to the A/E for such interest charge. The A/E's invoice shall not include any amount for reimbursement for such interest charge.

Failure on the part of the A/E to conform to the requirements of this section of the Manual and the VPPA may be considered a breach of the requirements of the Contract and/or a violation of law.

SECTION 317.0 AUDIT

The A/E shall provide documentation subject to audit for all invoices requesting payment for services provided on a cost reimbursement or hourly rate basis. Compensation paid to the A/E on these bases is subject to adjustment based on the results of the audit.

The A/E, by signing the Contract, agrees to retain all books, records, and other documents relative to the contract for five (5) years after final payment, or until audited by the Commonwealth of Virginia, whichever is sooner. The Owner, its authorized agents, and/or State auditors shall have full access to and the right to examine any of the materials during said period.

SECTION 318.0 CONFLICTS OF INTEREST

The A/E, including any subsidiaries or affiliates or other entities in which the A/E has a pecuniary interest, which design, prepare plans and specifications, or cost estimates for a construction contract is prohibited from providing all or a portion of said construction, or the supplies or equipment used in such construction. (§2.2-4373, *Code of Virginia*)

In addition, an entity which provides to the A/E any design services specifying a sole source for materials, supplies or equipment to be used in the construction shall be prohibited from bidding on, or otherwise furnishing such materials, supplies or equipment for the construction. This prohibition does not apply to a vendor who provides catalog information, technical data and such on products, material or equipment to the A/E for the A/E's consideration.

SECTION 319.0 RELEASE OF INFORMATION PERTAINING TO PROJECT DESIGN

Release in any form by the A/E of information pertaining to the estimated construction cost of a project under design to anyone other than authorized Owner personnel, personnel of the Division of Engineering and Buildings, and other A/E's or Consultants performing design of related state facilities is prohibited.

The A/E shall not give out information concerning a project to anyone other than authorized Owner personnel, other A/E's performing design of related facilities and personnel of the Division of

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Engineering and Buildings without specific prior approval of the Owner to release such information. This includes, but is not limited to, project photographs, floor plans, and project cost information.

When the project is ready to be advertised, the A/E may provide the following information to "construction information / plan room" services who serve the construction industry:

- type of project or facility,
- size (area) and number of stories,
- types of materials,
- bidding requirements,
- IFB (document) source, and
- a project cost range (e.g. \$3,000,000 to \$5,000,000).

As documents are issued to prospective bidders, a current list of plan holders should be made available to those who request such information, including the plan room services.

During the bidding period, the A/E shall not respond to requests by prospective bidders to clarify or state the intent of Plans or Specifications unless such requests are in writing. The response must be in the form of an addendum issued to all plan holders. Sources of supply for special equipment may be made available in writing to all bidders/contractors. The A/E should promptly prepare and issue addenda for any necessary corrections or clarifications of the Plans and Specifications.

SECTION 320.0 DEFAULT:

In case of the A/E's failure to deliver the reports, documents, 'Record Drawings', or services in accordance with the Contract terms and conditions, the Owner, after due written notice, may procure same from other sources, and the A/E shall be responsible for any resulting additional procurement and administrative costs. This remedy shall be in addition to any other remedies which the Owner may have.

SECTION 321.0 TERMINATION OF CONTRACT BY THE OWNER / AGENCY

General: The Owner may terminate the Contract for cause or for convenience after giving thirty (30) days written notice to the A/E. The written notice shall include a statement of reasons for the termination.

Termination for Cause: If the A/E should substantially breach the Contract or fail to perform the services, or any portion thereof, required by the Contract, the Owner may terminate the Contract for cause by giving written notice as set forth above or may give the A/E a stated period of time within which to remedy its breach of contract. If the A/E shall fail to remedy the breach within the time allotted by the Owner, the Contract may be terminated by the Owner at any time thereafter upon written notice, effective immediately upon receipt. The Owner's forbearance in not terminating the contract shall not constitute a waiver of the Owner's right to terminate in the future for similar

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breaches or failures to perform. If the Contract is terminated for cause, the A/E shall be responsible for all damages incurred by the Owner as a result of the A/E's breach of contract or failure to perform, including but not limited to, all costs and expenses incurred in securing a replacement A/E to fulfill the obligations of the Contract.

Any termination by the Owner for default, if determined by a court of competent jurisdiction not to have been justified as a termination for default, shall be deemed a termination for the convenience of the Owner.

Termination for Convenience: The Owner may terminate the Contract in whole or in part for convenience by delivering to A/E a written notice of termination as set forth above, specifying the extent to which performance under the contract is terminated and the effective date of the termination. Upon receipt of such notice, the A/E must stop Work, including but not limited to Work performed by subcontractors and consultants, at such time and to the extent specified in the notice.

If the contract is terminated for convenience, the A/E shall be entitled to those fees earned for Work performed in accordance with the Contract prior to the notice of termination. Thereafter, the A/E shall be entitled to any fees earned for work not terminated, but shall not be entitled to lost profits for the portions of the Contract which were terminated. The A/E will be compensated for reasonable costs or expenses for delivery to the Owner of the products of the services for which the A/E has or will receive compensation.

Delivery of Materials: Any termination shall not relieve the A/E of the obligation to deliver to the Owner all products of the services for which the A/E has been or will be compensated, including, but not limited to, the original drawings and specifications, copies of CADD diskettes or tapes, calculations, and analyses. Unless otherwise agreed to in writing, the A/E shall deliver the materials to the Owner within thirty (30) days of receipt of the notice of termination. Failure to do so shall result in the withholding of final payment and shall constitute a material or substantial breach of contract.

Compensation Due the A/E: When the A/E is terminated for convenience, the following method shall be utilized in computing amounts due the A/E for services prior to termination:

- If terminated at the completion of a design phase or the bidding phase, the amount due shall be the cumulative total of the fees for the phases completed according to the Contract.
- If terminated prior to completion of a design phase or the bidding phase, the amount due shall be the sum of the previously completed phase fees plus a negotiated amount based on the portion of services provided for the phase not completed.
- If terminated during the construction phase, the total amount earned shall be the sum of the previously completed design and bidding phase fees plus a negotiated amount based on the portion of the construction period services provided through the notice of termination.

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- Payment for the Additional Services portion of the fee shall be any portion of those services provided up through the notice of termination.
- Payment for the Reimbursable Expenses shall be based on approved reimbursable expenses incurred up through the notice of termination.

The A/E shall submit invoices for all such amounts in accordance with the normal billing process, but in no event later than 60 days after the last Work is performed. All amounts invoiced are subject to deductions for amounts previously paid or for amounts due the Owner.

SECTION 322.0 ASSIGNMENT OF CONTRACT

The A/E shall not assign the Contract between the Owner and the A/E, in whole or in part, without the written consent of the Owner.

SECTION 323.0 ANTITRUST

By entering into a contract, the A/E conveys, sells, assigns, and transfers to the Commonwealth of Virginia all rights, title and interest in and to all causes of the action it may now have or hereafter acquire under the antitrust laws of the United States and the Commonwealth of Virginia, relating to the particular goods or services purchased or acquired by the Owner under said Contract.

SECTION 324.0 ETHICS IN PUBLIC CONTRACTING (§2.2-4367 et seq., *Code of Virginia*)

The A/E shall not offer or receive any kickbacks or inducements from any other offeror, supplier, manufacturer or subcontractor in connection with this project. The A/E shall not confer on any public employee having official responsibility for this project any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value was exchanged.

SECTION 325.0 ANTI-DISCRIMINATION

By signing the Contract, the A/E certifies to the Commonwealth that it, as contractor for the services described in the RFP and the Contract, will conform to the provisions of the Federal Civil Rights Act of 1964, as amended, as well as the Virginia Fair Employment Act of 1975, as amended, where applicable, and §2.2-4310 and §2.2-4311 of the Virginia Public Procurement Act which provides that:

In every contract over \$10,000, the contractor (i.e. the A/E) agrees the provisions in (1) and (2) below apply:

1. *During the performance of this contract, the contractor agrees as follows:*

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- a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.*
 - b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.*
 - c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.*
- 2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.*

Where applicable, the “Virginians with Disabilities Act” and the federal “Americans with Disabilities Act” shall apply to the A/E and all subcontractors or consultants.

SECTION 326.0 CONTRACTUAL DISPUTES (§2.2-4363, Code of Virginia)

326.1 The Owner's Dispute Resolution Procedures shall apply if in writing and if attached to the contract. If not, the following procedures shall apply:

A/E claims for additional compensation, whether relating to additional services, delay or other, shall be submitted in writing, no later than sixty (60) days after final payment; however, written notice of the A/E's intention to file such claim must be given to the Owner's Project Manager at the time of the occurrence or beginning of the Work upon which the claim is based. The filing of a timely notice is a prerequisite to recovery under this Section. The Owner shall provide the A/E written notice of receipt of the A/E's written claim for additional compensation or the A/E's written notice of intent to file such a claim within thirty days of receipt of the A/E's notice or claim. Although the A/E may be required to submit certain classes of claims prior to final payment, and the A/E is not prevented from filing claims during the pendency of the Work, the Owner shall not be obligated to render a final written decision on any claim until after final payment. All claims shall be submitted along with all practically available supporting evidence and documentation.

No written decision denying a claim or addressing issues related to the claim, if rendered prior to final payment, shall be considered a denial pursuant to this Section unless the written decision makes express reference to this Section and is signed by the Agency head or his designee. The A/E may not institute legal action prior to receipt of the Owner's final written decision on the

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claim unless the Owner fails to render such a decision within ninety (90) days of submission of the claim or within ninety (90) days of final payment, whichever is later.

The decision of the agency head or other signatory on the Contract shall be final and conclusive unless the A/E within six (6) months of the date of the final decision on a claim, initiates legal action as provided in §2.2-4364, *Code of Virginia*. Failure of the Owner to render a decision within 90 days shall not result in the A/E's being awarded the relief claimed nor shall it result in any other relief or penalty. The sole result of the Owner's failure to render a decision within 90 days shall be the A/E's right to immediately institute legal action. No administrative appeals procedure pursuant to §2.2-4365, *Code of Virginia*, has been established for contractual claims under this Contract.

326.2 INFORMAL ALTERNATIVE DISPUTE RESOLUTION (§2.2-4366, *Code of Virginia*)

In the interest of successful completion of the project, disagreements and disputes should be resolved as soon as possible. To assist in resolving these disputes, the Director, Division of Engineering and Buildings offers agencies and A/E's an impartial Dispute Hearing Panel of 1 or more persons to perform an "Informal Alternative Dispute Resolution". The Agency and the Architect/Engineer may choose to resolve their claims against one another by Appeal to the Director, Division of Engineering and Buildings under the provisions of this "Informal Alternative Dispute Resolution Procedure" in lieu of instituting legal action. If the Agency and the A/E both choose to avail themselves of this service, the following stipulations shall apply:

- The Agency and the A/E must both agree to pursue this process and each submit their "Application for Informal Alternative Dispute Resolution"
- The Director, DEB will review the Applications and advise both parties of dates available for a hearing or deny the Application for a Hearing
- The Director, DEB will impanel a Dispute Hearing Panel with expertise in the topics of being disputed
- Each party will be represented by its personnel who have knowledge of the facts related to the dispute. Therefore, neither party will be allowed Legal Counsel at the hearing.
- The Panel will review the Application and facts presented by each party prior to the Hearing.
- Each party will be given the opportunity to present its position and factual data on each item in dispute. Information shall be concise / condensed.
- The Hearing Panel will ask questions as appropriate and facilitate discussions toward an agreeable solution.
- If the parties do not agree on a solution during the hearing, the Hearing Panel thru the Director, DEB will render an opinion on the proper resolution of the dispute.
- It is intended that the hearing be efficient and last no more than one day.
- The cost of this service will be based on the time charged to the Dispute Resolution times hourly rates for the panel. The cost will be divided and charged equally to the Agency and to the A/E unless both parties agree to other arrangements and notify the Director, DEB, prior to the hearing.

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The “Application for Informal Alternative Dispute Resolution Procedure” shall contain the following information:

- A/E Name
- Agency Name
- Project Name
- Project Number
- Listing of Items in Dispute (The A/E and the Agency shall each submit a listing of the items in dispute with its summary of the pertinent facts in the dispute.)
- Value of the items or Work disputed (in dollars): \$_____
- Documents and narrative that present the facts as the Applicant sees them for each disputed item
- Proposed Solution or Relief Sought
- Signature of the Chief Facilities Officer for the Agency or Contract Signature Authority for the A/E

SECTION 327.0 APPLICABLE LAW AND COURTS

The A/E contract shall be governed in all respects by the laws of the Commonwealth of Virginia and any litigation with respect thereto shall be brought in the courts of the Commonwealth, as provided under Virginia law.

In performing services under the Contract, the A/E shall comply with applicable federal, state and local laws and regulations.

SECTION 328.0 PROHIBITION OF ALCOHOL AND OTHER DRUG AT WORKPLACE

The Commonwealth of Virginia seeks to establish and maintain a work environment free from the adverse effects of alcohol and other drugs. The adverse effects of alcohol and other drugs create a serious threat to the safety and welfare of all personnel at the jobsite, to jobsite safety in general, to worker productivity and quality of workmanship, and to the project schedule.

In conformance with §2.2-4312, Code of Virginia, the A/E shall establish a written policy to maintain and enforce a drug-free workplace, to specify actions that will be taken against persons for violations of the policy, and to require that such policy be binding on each of its consultants, subcontractors and suppliers performing work on the contract.

The A/E’s policy shall prohibit the following acts by the A/E, its employees, subcontractors, consultants and suppliers while performing services under the terms of the Contract.

- (1) The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of marijuana or other drugs (except the possession and use of medically prescribed drugs for legitimate medical purposes) in the workplace or at the construction site;
- (2) The unlawful or unauthorized manufacture, distribution, dispensation, or use of alcoholic beverages in the workplace or at the construction site during hours of work;

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- (3) The impairment of a person in the workplace, or at the construction site, related to the use of alcohol, marijuana, or other drugs including impairment from prescription drugs.

The A/E shall post a copy of this policy in a conspicuous place at the workplace and assure that all personnel, including potential hires, are advised of the policy. A violation of this policy will be recognized as a breach of contract and may result in termination of the Contract.

For the purposes of this section, "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a contractor (i.e. the A/E and its consultants, subcontractors and suppliers), in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.

SECTION 329.0 DESIGN OF SECURITY SYSTEMS

Any Bidder/Offeror for the installation, service, maintenance, or design of security equipment or any central station alarm condition monitoring service shall be licensed by the Department of Criminal Justice Services pursuant to §9-183, *Code of Virginia*. An A/E proposing to provide any of these services with its own staff shall be exempt from the DCJS licensing requirement if properly licensed by the APELSCIDLA Board. (§9-183.2; *Code of Virginia*) If the A/E proposes to have the security system designed by a subcontractor/consultant, such entity shall be properly licensed as required by §9-183, *Code of Virginia*.

Any projects designed by the A/E which have such security systems shall include the licensing requirements of §9-183, *Code of Virginia*, in the specifications and the requirement that the successful bidder shall provide documentation within five (5) calendar days of bid opening that the entity (contractor or subcontractor) performing the security system work possesses the proper license.

SECTION 330.0 USE OF STANDARD FORMS AND FORMATS

The A/E shall incorporate in every construction contract the applicable **GS Form E&B CO-7** (General Conditions of the Construction Contract) and **CO-7a** (Instructions to Bidders), which may be found in Appendix A of the **A/E Manual**. These forms shall not be retyped or modified in any way. If changes are required to either, the changes shall be made in the form of "Supplemental General Conditions" or "Supplemental Instructions to Bidders". Such "Supplements" shall be approved by the Director of the Bureau of Capital Outlay Management prior to their incorporation in the construction contract.

The A/E shall use the applicable Capital Outlay Forms and the Standard Engineering & Buildings Forms which are listed in Appendix C of the **A/E Manual**. These Forms are available electronically for viewing and/or download from <http://forms.dgs.virginia.gov>. The wording on the forms shall not be modified or altered without the specific written approval of the Director of the Bureau of Capital Outlay Management. Where spaces are provided for insertion of information, the size of the space may be adjusted to accommodate the information being inserted.

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The A/E shall use the Standard Formats which are listed in Appendix C of the **A/E Manual** for the applications indicated. Formats are available electronically for viewing and/or download at <http://forms.dgs.virginia.gov>. Formats may be edited to delete portions which are not applicable to the project and to insert necessary information; however, the format and the basic wording shall be retained.

SECTION 331.0 REPORTS ON THE PARTICIPATION OF SMALL BUSINESSES AND BUSINESSES OWNED BY WOMEN AND MINORITIES :

The following is required for professional service contracts with a fee greater than \$100,000.

1. Periodic Progress Reports/Invoices: The A/E shall include a report on involvement, if any, of small businesses and businesses owned by women and minorities as a part of their periodic invoice. The report will specify the actual amounts of contracts to date with such businesses, and the actual dollars paid to date with such businesses on this contract. This information shall be provided separately for small businesses, women-owned businesses and minority-owned businesses.

The A/E shall provide two (2) copies of this information to the Owner. Failure to submit the required information, will result in invoices being returned without payment.

2. Final Actual Involvement Report: The A/E shall submit, prior to completion or at completion of the contract and prior to final payment, a report on the actual dollars paid to small businesses and businesses owned by women and minorities during the performance of this contract. At a minimum, this report shall include for each firm contracted, the Business Class, a comparison of the total actual dollars paid on this contract with the planned involvement of the firm, the totals for each business class as specified in the proposal, and the actual percent of the total estimated contract value. A format for the report will be provided by the Owner. A generic format is posted on the Forms Center